

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2012] NZERA Christchurch 287  
5373355

BETWEEN                      ROBERT GRAHAM  
   Applicant  
  
A N D                              TURNERS      &      GROWERS  
   LIMITED  
   Respondent

Member of Authority:        Helen Doyle  
  
Representatives:              David Beck and Shonagh Burnhill, Counsel for  
   Applicant  
   Penny Swarbrick, Counsel for Respondent  
  
Investigation Meeting:        4 and 16 September 2012 at Christchurch  
  
Submissions Received:        17 September 2012 from both parties  
  
Date of Determination:        21 December 2012

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**DETERMINATION OF THE AUTHORITY**

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- A.     Mr Graham was unjustifiably dismissed.**
- B.     Turners & Growers have been ordered to pay to his estate three months lost wages and compensation in the sum of \$12,000.**
- C.     Costs have been reserved and a timetable set.**

**Mr Graham**

[1]     Sadly in October 2012 Robert Graham passed away.

**Employment relationship problem**

[2] Mr Graham commenced employment with Turners & Growers Limited on 13 May 2002 as a temporary store person in inwards goods. After a few months he became a permanent employee unloading vegetable trucks, doing data entry and driving the forklift.

[3] Mr Graham had no disciplinary issues in his employment until 2011. In February 2011 he received a written warning for signing off on a pallet of limes that was later found to be six boxes short. Mr Graham then got a final warning in November 2011 for the miscounting of grapefruit. Mr Graham said that he was not happy about the warnings but was reluctant to challenge them because he had some health issues with a chronic obstructive airways condition, asthma and diabetes and the work suited him as it was a light duties role. Neither warning was therefore challenged within the time required to do so under the Employment Relations Act 2000.

[4] On 1 March 2012 Mr Graham's employment was terminated for reasons relating to sleeping on his parked up forklift on two occasions on 27 January 2012. His dismissal was confirmed in a letter dated 6 March 2012.

[5] Mr Graham said his dismissal was unjustified and he wanted to be reinstated; receive compensation in the sum of \$15,000, be reimbursed lost wages and costs.

[6] Turners & Growers Limited (Turners & Growers) is a duly incorporated company that carries on the business of the growing, packing, export and distribution of fruit and vegetables in New Zealand.

[7] Turners & Growers say that Mr Graham's dismissal was justified in all the circumstances both substantively and procedurally and that it did not breach its obligations to Mr Graham.

**Test of justification**

[8] The test of justification in s 103A of the Employment Relations Act 2000 provides:

- (1) *For the purposes of section 103(1)(a) and (b) the question of whether a dismissal or an action was justifiable must be*

- determined, on an objective basis, by applying the test in subsection (2).*
- (2) *The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*
- (3) *In applying the tests in subsection (2), the Authority or the Court must consider –*
- (a) *whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and*
- (b) *whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and*
- (c) *whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and*
- (d) *whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.*
- (4) *In addition to the factors described in subsection (3), the Authority or the Court may consider any other factors as it thinks appropriate.*
- (5) *The Authority or the Court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were –*
- (a) *minor; and*
- (b) *did not result in the employee being treated unfairly.*

### **The issues**

[9] The Authority needs to determine the following issues:

- (a) What was the reason for Mr Graham's dismissal?
- (b) Was Mr Graham's conduct on 27 January 2012 capable of amounting to serious misconduct?
- (c) Did Turners & Growers follow a fair and reasonable process:
- (i) Did it comply with its contractual and statutory good faith obligations?
- (ii) Should it have disclosed the witness statements at the time of the invitation to the disciplinary meeting?

- (iii) Was the period between the invitation to the disciplinary meeting and the meeting itself too short?
- (iv) Was Turners & Growers obliged to disclose the letter of instruction to Dr Hartshorn?
- (v) Should Turners & Growers have confirmed the purpose of the second meeting in writing to Mr Graham in all the circumstances?
- (vi) Could a fair and reasonable employer relying on the report of Dr Hartshorn and the other information it had before it any medical explanation for Mr Graham falling asleep on the forklift?

(d) Was Mr Graham's dismissal justifiable?

### **The individual employment agreement and employee's handbook**

[10] Mr Graham was party to an individual employment agreement dated 13 May 2002. This provided that in instances of serious misconduct the company may terminate employment without notice.

[11] The Turner & Growers employee handbook is relevant. Mr Graham acknowledged that he was aware of the handbook. The handbook provided, amongst other matters, examples of misconduct and serious misconduct together with progressive discipline steps of first and final warning and then dismissal. Conduct described as serious misconduct included *deliberate avoidance of duties (including sleeping on the job)*.

### ***What was the reason for Mr Graham's dismissal?***

[12] The initial allegation, and then the conduct in the letter of termination, was described as deliberate avoidance of duties by being caught sleeping on the job on two occasions on 27 January 2012. The conduct was referred to in those terms at the start of the second disciplinary meeting. Although that was the description of the conduct at three important times, the decision-maker, Tracy Boreham, acting Stores and Warehouse Manager, assisted at all times throughout the process by Jane Duncan, Human Resources Adviser, said that at no stage of the disciplinary process was there a

discussion with Mr Graham about deliberate avoidance of duties and the focus was on sleeping on the job. Mr Graham did not dispute this in his evidence. The wording of the conduct in both the initial letter and letter of termination, Ms Duncan confirmed, was simply taken from the employee's handbook.

[13] Ms Boreham in her evidence at the Authority investigation meeting said that she did not feel at any stage that Mr Graham had deliberately fallen asleep on the forklift. A fair and reasonable employer could not therefore have concluded there was conduct that justified summary dismissal on the basis that the sleeping was a deliberate avoidance of duties.

[14] For present purposes I accept the evidence of Ms Boreham and Ms Duncan that the reason Mr Graham was dismissed was because he was found asleep on his stopped forklift rather than because he was deliberately avoiding duties by sleeping. I will revisit the description of the conduct when assessing procedural fairness.

***Was Mr Graham's conduct on 27 January 2012 capable of amounting to serious misconduct?***

[15] Counsel accepted that sleeping on the job or on duty has been found in employment cases to be conduct that is capable of constituting serious misconduct that might lead to dismissal. I agree with Mr Beck's submission though that these sorts of cases usually involve an element of intention to sleep and attempts to conceal that or involve some self inducing fatigue due to late nights or alcohol consumption and/or employees not following medical directions.

***Did Turners & Growers follow a full and fair process?***

[16] Ms Boreham was alerted to the issue of Mr Graham having been found sleeping on his forklift during a project she was working on analysing sick leave use in the business. As part of her analysis she spoke to the team leaders on or about 2 February 2012. One of the team leaders, Simon Friend, advised Ms Boreham that the previous Friday Mr Graham went home sick about 6pm. Mr Graham's normal hours were 12 noon–8.30pm. Ms Boreham inquired with Mr Friend as to the reasons he had gone home and Mr Friend said that he had found Mr Graham asleep on the stopped forklift about 5pm. He said that Mr Graham had then gone to Mr Friend and advised he was unwell due to his diabetes and needed to go home.

[17] The Southern Warehouse Quality Auditor, Jude Will overheard the conversation and advised that she had also found Mr Graham asleep on the forklift that day but earlier into his shift, about 3pm. She said that he had been slumped over the wheel and she initially thought that he was dead. The location of the forklift when it had been parked was a matter of some dispute at the Authority. Ms Boreham accepted that she did not speak again to Ms Will or Mr Friend about that matter although she concluded that it was parked in an area that was unsafe because it was to the side of the tunnel and trucks use that area. Ms Boreham contacted Ms Duncan to obtain some advice about the next step she should take. Ms Duncan advised her that she should obtain written statements from Mr Friend and Ms Will and she duly did this. Mr Friend's statement that he signed on 8 February 2012 provided:

*On Friday the 27<sup>th</sup> of January I found Bob Graham asleep on the forklift. It didn't take more than a minute to wake him. He said 'he just dozed off'. The forklift was not running. This was around 5.00pm. Shortly afterwards he approached me, asked me if he could go home as his diabetes was playing up and he felt sick and tired.*

[18] The statement from Ms Will was also signed on 8 February 2012 and provided:

*On Friday the 27<sup>th</sup> of January I came through the roller door to clock out about 3pm. Saw Bob slouched over the wheel on the forklift & my initial reaction was 'oh my God he's dead'. The forklift was parked up correctly and engine off. I touched his arm as I said Bob are you okay & he woke up. He came too and said 'shit I did fall asleep'. He took a while to wake so must have been asleep for a while. He did look terrible.*

[19] The disciplinary process formally commenced when Mr Graham was handed a letter on 8 February 2012 by Ms Boreham requesting he attend a disciplinary meeting the following day. In the letter Mr Graham was advised that the purpose of the meeting was to discuss and investigate allegations of serious misconduct against him, specifically his deliberate avoidance of duties by being caught sleeping on the job on two occasions on 27 January 2012. Mr Graham was advised to bring a representative with him to the meeting and he was advised that Ms Duncan and Ms Boreham would be attending the meeting. The letter informed him that it was considered to be a serious matter which may result in disciplinary action up to and including dismissal.

[20] Mr Beck submits that it was unfair that the statements of Mr Friend and Ms Will were not disclosed to Mr Graham at the same time he was handed that letter. I agree with Mr Beck that would have been the preferable approach. The statements

were provided to Mr Graham during the meeting of 8 February so although there was initially an element of unfairness Mr Graham was provided with the details of the statements and who made them before the decision to dismiss was made.

[21] Mr Graham was asked clearly at the meeting whether he would prefer to have a representative present. He made a decision not to be represented. I could not be satisfied that he would have formed a different view if he had the statements of Mr Friend and Ms Will or if there had been a longer period before the meeting.

### **Meeting 9 February 2012**

[22] The disciplinary meeting commenced at 12.30pm on 9 February 2012 and it was attended by Mr Graham, Ms Boreham and Ms Duncan. There were two parts to the meeting. During the second part of the meeting the Health and Safety Manager, Jannette Rogers attended. Notes were taken of the meeting by Ms Boreham. These were presented in a typed format. Ms Boreham could not locate her handwritten notes that she had typed the notes from. Mr Graham did not take issue with the typed record and I accept it is an accurate account although not verbatim of what took place at the meeting.

[23] It would have been the action of a fair and reasonable employer to present to Mr Graham at the start of the meeting the statements from Mr Friend and Ms Will. That did not occur. Mr Graham was I find somewhat at a disadvantage in answering the early questions because he could not clearly recall the day in question. Some of Mr Graham's answers were wider than addressing the issues of sleeping and more directed toward the allegation of deliberate avoidance of duties. Mr Graham, for example, said that he didn't get regular breaks and that he would put his head on his hands every chance he got. He couldn't recall sleeping and said that he was just resting on the forklift. He did say though, when asked by Ms Duncan if there was anything that was affecting his ability to do his job that he was *running on empty because of my diabetes and even have to wear sneakers because my feet are swollen and he couldn't sleep because I am on a final written warning*. He said that he wanted to know who had said that he had done something wrong.

[24] A short break was then taken whilst Ms Duncan and Ms Boreham discussed whether the statements should be shown to Mr Graham. When the meeting resumed at 12.50pm he was shown the witness statements after he said that two days

previously he drove out to his car to get his inhaler and fell asleep in his car for half an hour. After Mr Graham read the statements from Mr Friend and Ms Will he agreed they would have no reason to lie and that both of them were credible people. He couldn't remember the shift in question and when asked whether he recalled asking to go home, he accepted that could well have been correct but he couldn't remember. He said that he had been *crook for years but I still make it work not like a lot of other people here. Most of the time I feel a lot better when I get to work. Look at the bigger picture – I worked for five hours that day.* He did not accept there had been other occasions when he had fallen asleep on the fork hoist and said he only ever rested on them with his head in his hands.

[25] Mr Graham was then advised that Ms Boreham and Ms Duncan would like to adjourn the meeting so they could speak to Ms Rogers. They explained that this was because he had raised some health issues in terms of his diabetes and being stressed. Ms Rogers, after an adjournment of about twenty minutes joined the meeting and she asked Mr Graham some questions about his diabetes saying that because of his diabetes acting up the company needed to be sure that he was not placing himself or others at risk by driving the forklift. She explained that they would like to send Mr Graham to an occupational medical specialist to determine the extent to which his diabetes is affecting him and his ability to do the job safely. Mr Graham was not particularly amenable to that suggestion and initially he wanted to go to his own doctor. Ms Rogers made it clear that it would be the company's preferred view that an independent report was undertaken and Mr Graham agreed that he would see the medical specialist signing an authority to release medical information. Ms Duncan then advised Mr Graham that the company would like to send him home after the meeting for the remainder of the week (two days) on full pay to enable him to rest. He was further advised that when he returned to work, the company would like him to stay off the fork hoist until the report was back ensuring that the company was not being placed at risk. I do not find there was any significant procedural unfairness arising from the first meeting.

[26] On 13 February 2012 Ms Rogers wrote to Dr David Hartshorn, an occupational medical specialist at Rumball Souter Floyd & Associates about the assessment to be carried out on Mr Graham. I consider the penultimate paragraph to be important because that was an instruction to Dr Hartshorn about what was required of him. This paragraph provided:



*We would appreciate knowing the full extent of Bob's health issues, particularly his diabetes and his sleep issues. We would also appreciate an objective view of the potential impact Bob's current job is having on his health and also what affect his health issues may have on him in relation to carrying out his current role with Turners & Growers Limited.*

[27] There was criticism made in Mr Beck's submissions that Mr Graham was not shown a copy of the letter instructing the doctor. Ms Swarbrick submits that there was no obligation on the respondent to provide the applicant its letter to Dr Hartshorn and that had a copy been requested, one would have been provided. Ms Swarbrick also submits that the medical report was called for to check Mr Graham's explanation about his diabetes causing him to fall asleep on 27 January 2012. I do not accept that submission. Dr Hartshorn was asked to provide a much broader report on Mr Graham's health issue, one that was consistent with the purpose of the consultation as Ms Rogers had explained it to Mr Graham at the first disciplinary meeting. There was no clear request for Dr Hartshorn to give a view as to whether diabetes had caused or had been a contributing factor to Mr Graham's falling asleep on 27 January 2012. Dr Hartshorn was not told by Ms Rogers that Mr Graham was undertaking a disciplinary process following his being found asleep on his forklift. The report called for was to address concerns about whether Mr Graham could perform safely the operation of the forklift. It was the action of a fair and reasonable employer to call for such a report. There can be no criticism of Ms Rogers.

[28] Where conclusions though were drawn as they were from the report that Mr Graham's medical condition had not caused him to fall asleep on the forklift on the day in question then I find in good faith both the report and the instructing letter should have been provided to Mr Graham before the disciplinary outcome meeting as they were both matters relevant to the continuation of his employment. I do not accept Ms Swarbrick's submission that it would not have made a difference. It would have become clear upon Mr Graham reading the letter of instruction that Dr Hartshorn was not instructed to report whether diabetes or stress caused Mr Graham to fall asleep on 27 January. He could have said that in the final meeting.

[29] Mr Graham attended with Dr Hartshorn on 15 February 2012. Mr Graham as provided by his report outlined to the doctor three significant health issues and these included some issues with respect to sleep. Some of the sleep difficulties were because the asthma was an issue and there was a difficulty with lying flat. Dr Hartshorn set out the medication that Mr Graham was taking and the final part of

Dr Hartshorn's report headed *Discussion* sets out that Mr Graham presented for an assessment of his medical work fitness following two episodes whereby he was observed to be asleep while sitting on the forklift. He noted further that those events occurred upon the background of previous sickness absence issues, which have been relatively well controlled over recent times. He said that the assessment had identified a number of significant health issues but there was no specific factor identified that would constitute a barrier to the ongoing safe performance of work activities.

[30] He noted in his report that Mr Graham did not present with a history of significant diabetic complications that would impact on his capacity to safely engage in forklift driving activities. He said that there does not appear to be an indication of hyperglycaemic episodes that would potentially result in loss of judgement or control when engaged in forklift driving. He set out that Mr Graham did describe some degree of disordered sleep pattern and he tended to fall asleep easily but wake frequently throughout the night. He said that Mr Graham did not describe symptoms suggestive for significant hypersomnolence during the day and does not have a tendency to fall asleep inappropriately, such as when driving. He concluded that there was no definitive evidence to suggest the sleep disorder would in itself constitute a medical barrier for the same performance of ongoing work activities.

[31] On 23 February 2012, Mr Graham telephoned Ms Duncan to discuss his concerns about being on a final written warning. Mr Graham was advised that the company had received the medical report and he would be given a copy on 24 February 2012. Ms Duncan also advised Mr Brown that she would be down the following week regarding the outcome of the disciplinary meeting. Mr Graham was permitted to return to work on the forklift after 24 February 2012. Prior to that save two days away from the workplace on 9 and 10 February 2012 he had been undertaking office/administrative work.

[32] A final meeting was held on 1 March 2012. There was no formal letter sent to Mr Graham before the meeting of 1 March 2012 advising of its purpose. There had been advice in an email dated 23 February from Ms Duncan that the meeting about the outcome of the disciplinary process would be the following week. Ms Duncan then telephoned Mr Graham on 29 February 2012 to confirm the meeting on 1 March.

[33] Mr Graham said that he thought the meeting on 1 March 2012 was for the company to say to him that he *should not have been asleep* and he *shouldn't do it again*. Ms Swarbrick submitted that it was enough Mr Graham understood there would be an outcome to the disciplinary process at the meeting. It was the outcome not the purpose of the meeting she submits was a surprise to him. Ms Duncan said in evidence and this accords with the notes of the meeting that it was proposed that the outcome be that of dismissal and the meeting was an opportunity to tell Mr Graham that and hear from him.

[34] I have taken into account in objectively determining fairness the circumstances of this disciplinary process. There had been at the first disciplinary meeting a decision by Turners & Growers to assess the health and safety of Mr Graham continuing to drive the forklift. The medical report did not identify any specific medical factors being a barrier to safe ongoing work. Mr Graham emailed Ms Rogers after the release of the report and it was agreed Mr Graham could return to drive the fork hoist. A note of a phone discussion between Ms Rogers and Mr Graham on 24 February 2012 provides Ms Rogers advising Mr Graham that it was great news there were no issues with his ability to drive the fork hoist. This was in response to Mr Graham stating in no uncertain terms that he wanted to know why he could not return to work on the fork hoist now he had been cleared as safe for such work. Mr Graham's focus was clearly on that medical report that cleared him for duties.

[35] Whilst Mr Graham expected some outcome on 1 March because that had been discussed with Ms Duncan it was unfair of Turners & Growers, in the circumstances where there was a change in focus from the safety of Mr Graham to perform his role back to the disciplinary process, not to formally advise Mr Graham in writing about the purpose of the disciplinary meeting, the risk of dismissal as an outcome and the right to have a representative. It would also have been fair for Turners & Growers to have given their view in the same letter that the medical report did not establish Mr Graham's health issues contributed to him falling asleep on 27 January and on that basis it was proposed the dismissal was an outcome. This unfairness can be considered as another factor under s 103A (4) and also under s 103A (3)(c). Mr Graham did not get a proper opportunity to respond in anticipation of the meeting on 1 March 2012 to Turners & Growers view that health concerns about Mr Graham could be eliminated following the receipt of the medical report. There was no proper

explanation as to the basis on which this view had been formed at the meeting on 1 March.

[36] The meeting was attended by Mr Graham, Ms Boreham and Ms Duncan and I am satisfied that Mr Graham was advised that he could have a representative present. At the meeting Ms Duncan set out its purpose being that there had been a deliberate avoidance of duties by Mr Graham as he was caught sleeping on the job on two occasions. His explanations were set out in notes taken at that time and he took no issue with them as:

- A concern that he was on a final written warning;
- That he didn't get regular smoko breaks so he took them on the fork hoist;
- His diabetes was causing him concern;
- That he'd admitted he might have been asleep but couldn't remember and that he'd stated the two witnesses had no reason to lie and agreed that they were credible;
- He had admitted going to his car to get his inhaler and falling asleep for half an hour outside of his break; and
- That resting on the fork hoist was common and other employees had slept on the fork hoist.

[37] Ms Duncan then proceeded to say that the response from Turners & Growers was that the report did not identify any medical reasons which would cause Mr Graham to fall asleep at work so health was eliminated as a contributing factor. Further there was no evidence that other employees had slept on the job and that Mr Graham had been caught sleeping on two occasions and had not provided a justifiable reason for doing so. Ms Duncan then advised that sleeping at work was deemed to be serious misconduct and totally unacceptable and it was proposed to terminate Mr Graham's employment immediately but that they would like to give him an opportunity to provide feedback on the outcome.

[38] Mr Graham's response was to the effect that Ms Duncan had *to be joking* and that his *ten years' service meant nothing*. The meeting then adjourned for ten minutes

and on resumption Mr Graham made a few brief points including *what was the point in sending me to the doctor and I am not a danger to anyone*. He did not accept that he had done anything wrong and that he was sleeping in his smoko break. When he had finished Ms Duncan advised that he had not provided feedback to change the proposed outcome and his employment was to be terminated effective immediately and he was to remove his personal property on site.

[39] I am not satisfied for reasons set out above that a fair and reasonable employer could have concluded from the medical report of Dr Hartshorn that there was no causation between Mr Graham's medical conditions and his falling asleep on 27 January 2012 without undertaking further investigations with Dr Hartshorn, Mr Friend and Ms Will. Turners & Growers have adequate resources and human resource advisors to have undertaken such further inquiries with relative ease and at minimal expense. The failure to undertake further inquiries was a significant procedural failure under s103A (3)(a) but also under (c) and (d) that overlapped with substantive fairness. It was not a minor procedural defect under s 103(5) of the Employment Relations Act 2000. There was clear information before the decision maker, Ms Boreham, in the statement of Mr Friend and to a lesser degree in the statement of Ms Will that Mr Graham was unwell on 27 January 2012. Mr Graham told Mr Friend on that day it was because of his diabetes and he asked to go home as he was unwell after the second time he fell asleep. Dr Hartshorn confirmed that Mr Graham had diabetes.

[40] The process for the reasons set out above is not what a fair and reasonable employer could have done in all the circumstances and I am not satisfied that a fair and reasonable employer in all the circumstances could have concluded that there was serious misconduct when and because Mr Graham fell asleep.

***Was Mr Graham's dismissal justifiable?***

[41] Mr Graham had significant health issues but he had managed them in undertaking his role. It would have been clear to Ms Boreham and Ms Duncan that his role was very important to him and he was sensitive to any suggestion that his medical conditions may affect that role continuing. When Mr Graham was found asleep on his parked up forklift on two occasions on one day his main explanation for sleeping was that he was unwell on the day in question and his diabetes was playing up. A fair and reasonable employer could have placed weight on that explanation

because it was consistent with what he had told Mr Friend that day when he left early to go home.

[42] It was accepted by Ms Boreham that the falling asleep was not deliberate. There was no suggestion that it was as the result of late nights or partying. She said that she could not conclude why Mr Graham had slept. There was sufficient information, or could have been with further inquiry so that a fair and reasonable employer could not have properly eliminated the diabetes as a cause. There were concerns that Mr Graham showed no appreciation that to fall asleep on a fork hoist, albeit parked, is dangerous and he had not said that he would no longer have a break on a fork hoist rather than the smoko room. I am not satisfied that a fair and reasonable employer could have justified summary dismissal on that basis particularly where there had been a misdescription of the conduct as deliberate avoidance of duties by sleeping which objectively assessed caused Mr Graham to somewhat labour the break/resting up issues. A fair and reasonable employer could not conclude whether he was on a break or not and indeed in this case did not. Mr Graham had had ten years service and that should have been taken into account. The warnings were not relied on as it was concluded there was serious misconduct.

[43] I find in conclusion that the decision to dismiss Mr Graham and the process undertaken to arrive at that decision was not what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal. The dismissal was unjustified. Mr Graham's estate is entitled to remedies.

### **Remedies**

[44] Although reinstatement was a focus in remedies the Authority also heard evidence about lost wages and compensation.

### ***Contribution***

[45] I am not satisfied that Mr Graham contributed in any respect to his dismissal and no deduction is to be made to the awards I go on to make.

### ***Lost Wages***

[46] Mr Graham only made a limited attempt to find another role. His health was a factor in this and he was on a sickness then an invalids benefit. Had Mr Graham not

been dismissed then there was a medical report that confirmed he was able to safely carry on with his role. I do though take into account the issues around mitigation and that there was some evidence that there was some deterioration in Mr Graham's health over winter although he did manage to get the diabetes under control with insulin. I will limit recovery under this head to three months lost wages under s 128 (2) of the Employment Relations Act 2000 and I so order. I will leave the amount for counsel to calculate as Mr Beck asked in final submissions that I do.

### ***Compensation***

[47] Mr Graham described himself as having a *melt down* when he was dismissed and that he cried. His evidence was focused on the fact that given his age and health he had few other opportunities and his work had brought him a great deal of satisfaction and a sense of routine. He felt isolated without it. He described in his written evidence that he had struggled to meet living expenses and that he felt robbed of any purpose in life. He was mildly depressed.

[48] In all the circumstances I am of the view that there should be an award of \$12,000 for compensation.

[49] I order Turners & Growers Limited to pay to the estate of Robert Graham the sum of \$12,000 without deduction being compensation under s 123 (1) (c) (i) of the Employment Relations Act 2000.

### **Costs**

[50] Mr Graham was legally aided. Counsel may be able to reach an agreement failing which Mr Beck has until 18 January 2013 to lodge and serve submission as to costs and Ms Swarbrick until 8 February 2013.

Helen Doyle  
Member of the Employment Relations Authority